No. 20770.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STOFFERS EXCLUSIVE, a California corporation, and MANFIEL, INC., a California corporation,

Appellants,

vs.

GENERAL ELECTRIC COMPANY, a New York Corporation, *et al.*,

Appellees.

BRIEF OF APPELLEES THE MAYTAG COMPANY AND MAYTAG WEST COAST COMPANY.

HORACE L. HAHN,
Suite 604,
615 South Flower Street,
Los Angeles, Calif. 90017,

FRANK R. JOHNSTON,
NEWLIN, TACKABURY & JOHNSTON,
1100 Roosevelt Building,
727 West 7th Street,
Los Angeles, Calif. 90017,

Attorneys for Appellees The Maytag Company and Maytag West Coast Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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UNITED SHOPPERS EXCLUSIVE, a California corporation, and MANFREE, INC., a California corporation,

Appellants,

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GENERAL ELECTRIC COMPANY, *et al.,*

Appellees.

BRIEF OF APPELLEES THE MAYTAG COMPANY AND MAYTAG WEST COAST COMPANY.

Statement of Jurisdiction.

The District Court had jurisdiction of the actions brought by plaintiffs against defendants under 15 U.S.C. 15, 26 [R.[1] 1-14, 15-27].

Jurisdiction was vested in the District Court pursuant to Rules 50(a) and 41(b) of the Federal Rules of Civil Procedure to order a directed verdict and dismissal

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[1]The Clerk's Transcript of Record will be referred to herein as "R". The Reporter's Transcript of the oral proceedings during the trial will be cited as "Tr." Plaintiff's Exhibits which were admitted will be referred to as "Pl.Ex." The Exhibits marked for Identification only will be referred to as "Pl.Ex. for Id." The Exhibits of these Appellees will be cited as "DMT Ex." References to depositions will be cited as "Dep." The Opening Brief of Appellants will be designated as "Op. Br."

of the action at the close of the evidence offered by plaintiffs.

This Court has jurisdiction pursuant to 28 U.S.C. 1291.

Statement of the Case.

The actions filed in the District Court were for treble damages and injunctive relief under the antitrust laws. The District Court ordered that the issue of liability be tried first [R. 1608-1609]. At the conclusion of the plaintiffs' case, the Court granted the defendants' Motions for a directed verdict and for dismissal [Tr. 6916]. A Judgment on the directed verdict and Order dismissing complaints was entered [R. 1977-1978]. The Court prepared and filed its Memorandum Opinion and Order granting Motions for directed verdict [R. 1912, 1976].

Appellants' principal claim, that of a conspiracy to boycott Appellant Manfree, and their assertion that its purpose was to maintain a list price structure below which major household appliances and televisions sets could not be sold at retail has no basis in fact, or on any inference that could be justifiably drawn from the facts adduced.

The assertion that Maytag became a member of a conspiracy to boycott plaintiffs for the purpose of maintaining suggested retail sales prices is completely without merit. Admittedly Maytag furnished suggested retail prices to dealers. Almost always retailers handling Maytag items sold below suggested retail prices [Tr. 3383]. Of extreme importance is the undisputed proof that Maytag furnished advertising funds to dealers who advertised Maytag units at prices below suggested retail prices. Advertising at below suggested retail prices for

which there was reimbursement by Maytag West Coast, was placed by both asserted conspirators and non-conspirators. In the first group there were defendants Hale and Sterling. In the second group there were Young Bros., Cherin's, Butler Brothers and West Coast Washing Machine Co. (also known as Mac's Appliance Company). The record references relating to this evidence are set forth at page 13 *infra.*

Appellee, The Maytag Company, during the period covered by the complaints was a manufacturer of washing machines and dryers (Op. Br. 8).

Appellee, Maytag West Coast Company, was the wholly owned subsidiary of The Maytag Company and distributed Maytag products in portions of the west including the San Francisco area. The Maytag Company and Maytag West Coast Company have been considered as one unit or entity by Appellants, and collectively they will be sometimes herein referred to as Maytag.[2]

John P. Mitchel[3] arrived in the San Francisco area in January of 1959 [Tr. 3310] and assumed the post of salesman-regional manager for Maytag West Coast in the San Francisco area and adjacent locations [Tr. 3306-3307].

Mr. Mitchel's predecessor was Mr. Fenn Wilson [Tr. 3311]. Mr. Mitchel surveyed the San Francisco area

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[2]In the deposition of Claire G. Ely, which plaintiffs designated as part of the record [R. 2063, 2070, 2082], Mr. Keith, plaintiffs' counsel, in referring to The Maytag Company and Maytag West Coast Company, made the following statement:

> "MR. KEITH: It's my position that the two companies are indistinguishable." ELY Dep. p. 91].

[3]John P. Mitchel is not to be confused with John L. Mitchell of W. J. Lancaster Co., one of the original defendants [Tr. 3404].

with a view to improving the position of the Maytag line in the market [Tr. 1112]. Maytag's penetration of the market had been unsatisfactory [Tr. 3320, 1112]. In the early part of 1959 Mr. Mitchel became acquainted with the Maytag dealers in San Francisco County including Manfree [Tr. 3311].

Manfree had a franchise with the Maytag West Coast which was to expire by its terms on March 31, 1959 [Tr. 3375, DMT Ex. 13143].

The Maytag line being more expensive than that of its competitors required retail outlets in which the salesmen employed by retailers would be willing to be educated in the superiority of Maytag products so that they could effectively promote the sale of them [Tr. 3376-3377, 3424].

The following three business reasons were given by Mr. Mitchel for not renewing the Manfree franchise:

1. On calling upon Manfree in the early part of 1959 Mr. Mitchel found the principal salesman in the appliance department, Mr. Arnold Neermann, unwilling to be educated as to Maytag products [Tr. 3376-3377, 3422, 3425, 3427].

2. Mr. Neermann, according to Mr. Mitchel, smelled like a distillery [Tr. 3376-3377, 3425].

3. Mr. Mitchel also was of the opinion that a closed-front membership operation was not a desirable outlet for the Maytag line, in that Maytag was advertised nationally, and the advertisements did not carry the information that to see a Maytag it was necessary to belong to a group or a membership type of store, and a closed front membership operation restricted the potential traffic [Tr. 3379, 3428].

Two or three weeks prior to the expiration date of the Maytag West Coast-Manfree franchise, Mr. Mitchel advised a representative of Manfree that the franchise would not be renewed [Tr. 3382].

The record does not show that Mr. Mitchel or any representative of Maytag knew what product lines, other than Maytag, were or were not available to Manfree. The testimony on this subject is found at [Tr. 3357].

There is no evidence in the record that any retailer defendant conditioned its purchases from Maytag on the promise of Maytag not to deal with Manfree. The evidence establishes the contrary [Tr. 3324-3325].

Appellants' assertions at page 79 and elsewhere in their Brief that at the time that Maytag and certain other lines were cancelled, Manfree's officers were told by vendor representatives that the reasons for such cancellations were either pressure from Hale or other large San Francisco retailers not to sell Manfree, or threats that if they sold to Manfree, they could not sell to such competing retailers, is completely without foundation. The evidence as to Maytag proves the contrary. Plaintiffs' Exhibit 641 shows that defendants Hale, Lachman Bros., Redlick and Sterling all purchased from Maytag during at least a part of the time Maytag was selling Manfree, which was from January 1958 until March of 1959 [Pl. Ex. 1523].

Appellants take the position that there was parallel conduct on the part of the defendant suppliers of household appliances and television sets. Such was not the case. Some suppliers sold to Manfree, others did not. Those that did sell did so for non-identical periods [Pl. Ex. 1523].

For example, defendant Lancaster stopped selling to Manfree in November of 1957, and Maytag did not commence selling to Manfree until January of 1958 [Pl. Ex. 1523].

As mentioned above, the Maytag West Coast franchise with Manfree expired by its terms on March 31, 1959 and Maytag did not thereafter sell Manfree. It is noteworthy that defendant Macy's bought no units from Maytag in 1960 [Pl. Ex. 641], and that defendant Redlick purchased nothing from Maytag in the years 1960, 1961 and 1962 [Pl. Ex. 641].

Also of significance is the fact that at the same time the Manfree franchise was not renewed, twenty to thirty other dealer franchises were likewise not renewed. These dealers included defendants Lachman Bros. and Sterling Furniture [Tr. 3332-3333, 3430].

It is important to point out that plaintiffs in answer to interrogatories propounded by Maytag stated under oath that the conspiracy of which Maytag became a member on April 30, 1959, was commenced prior to that time, and is known to plaintiffs to have existed in May, 1957 (Appellants' Specification of Errors, page xxxi). The significance of plaintiffs' answer to these interrogatories will be discussed at pages 38-44, 49-51 herein.

Apart from the refusal to deal after March or April of 1959, Appellants seize upon isolated and meaningless acts of Maytag to establish its participation in the asserted conspiracy, to wit, the purchase by Hale in February of 1959 of $10,848.00 of Maytag merchandise for use at seven Hale stores [Tr. 3382; Pl. Exs. 639 and 640], and the furnishing by Maytag West Coast to Hale in February of 1959 of a $3,000.00 advertising allowance.

There is no evidence in the record that Maytag had any connection whatsoever with Appellants asserted inability to advertise in certain newspapers.

Furthermore, Maytag was not a member of NEMA [Tr. 3494], nor EIA (Op. Br. 74), nor did it participate in its activities, nor did Maytag participate in Better Business Bureau activities or Northern California Electrical Bureau functions (Op. Br. 108).

Admittedly The Maytag Company was a member of AHLMA, and representatives of The Maytag Company attended AHLMA meetings.

Other evidence will be alluded to in the argument which follows:

Questions Involved.

Appellants have advanced a number of points and contentions. The questions which pertain specifically to the Maytag Appellees are the following:[4]

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[4]Other points raised by Appellants are met in Appellees', General Motors-Frigidaire Brief, to which reference is made, under the headings pertaining to the following subjects:

Discovery—I;

The correctness of the Pretrial Order under August 17, 1965 [R. 1608-1609]—II;

The correctness of the August 13, 1965 Pretrial Order separating the issues of liability and damages—III;

Advertising in San Francisco newspapers—IV-A6;

The exclusion of portions of the Alpine deposition—V-A(3);

The exclusion of certain documents relating to Trade Associations—V-A(4);

Studies prepared by Appellants—V-A(5);

Evidence *re* the Better Business Bureau—V-B(1);

Evidence as to the San Francisco Call-Bulletin—V-B(2);

Evidence as to the *Klors* lawsuit—V-B(3), (Maytag was not involved in the *Klors* case Op. Br. 168);

Miscellaneous evidence points—V-B(4);

The taxation of costs was proper—VI.

(This footnote is continued on the next page)

1. Did Appellants, in accordance with the governing rules, make out a case of participation by Maytag in a conspiracy to boycott Manfree?

2. Did the trial court err in its rulings on evidence?

3. What probative value to Appellants were acts antedating April 30, 1959, the date plaintiffs claimed Maytag joined the asserted conspiracy?

4. Did the Court err in its discovery rulings?

Summary of Argument.

Maytag's argument in summary is:

1. There is no evidence which would support an inference of Maytag's participation in any alleged conspiracy. Maytag's acts were the product of legitimate business aims.

2. The court's evidence rulings pertaining to Maytag were not error.

3. Evidence relied upon by Appellants antedating April 30, 1959 can not be relied upon to establish injury to plaintiffs or as acts in furtherance of an asserted conspiracy, which Maytag, according to plaintiffs' claim, did not join until April 30, 1959.

4. There was no error as to Maytag with respect to the Court's discovery rulings.

Reference is also made to the treatment of the exclusion of certain documents relating to trade associations in Brief of Appellees Borg-Warner and Norg Sales under headings IV-B(2), (3) and (4), and to the exclusion of portions of the Alpine deposition in Brief of Appellee California Electric, pages 26-31.

ARGUMENT.

I.

THERE WAS NO EVIDENCE OF MAYTAG'S PARTICIPATION IN THE ASSERTED CONSPIRACY AMONG APPELLEES IN VIOLATION OF SECTIONS 1 AND 2 OF THE SHERMAN ACT, NOR WAS THERE ANY EVIDENCE WHICH WOULD SUPPORT ANY FAIR OR REASONABLE INFERENCE OF SUCH PARTICIPATION.

The Appellants' constant reiteration that there was a conspiracy to boycott Manfree for the purpose of maintaining list prices is completely without foundation. As will be shown at page 13, *infra,* Maytag not only knew that defendants Hale and Sterling and other retailers were offering, by newspaper advertisements, Maytag appliances at prices below list, but additionally, Maytag furnished cooperative advertising for such advertisements.

Maytag's decision not to renew the Manfree franchise was for legitimate business reasons discussed, *infra,* pages 16-20.

There is no evidence in the record to show that the Maytag West Coast decision not to renew the Manfree franchise was determined by anyone other than Maytag West Coast personnel [Tr. 3404-3405].

Appellants conceded that there was no direct evidence of conspiracy among Appellees [R. 1439].

Cases such as *Standard Oil Co. of California v. Moore,* 251 F. 2d 188 (9th Cir. 1957); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Klors*

v. Broadway-Hale Stores, 359 U.S. 207 (1959), and *Girardi v. Gates Rubber Company Sales Division, Inc.,* 325 F. 2d 196 (9th Cir. 1963), relied upon by Appellants, are not apposite.

In the *Moore* case there was evidence of communications and contacts among competitors of a nature not present in the case at bench, p. 209. Likewise, in the *General Motors* case, there was proof of agreements among the defendants not to permit certain outlets access to automobiles, pp. 143-144. In *Klors,* which was decided on a motion for summary judgment, the Supreme Court's decision rested on the question of injury to the public. The complaint in *Klors* alleged a combination, p. 213, no like evidence exists here. In *Girardi* at least one of the dealers, a Mr. Oranges, complained to Gates of Girardi's price cutting, p. 202. No such evidence is present here.

Appellants contend that a conspiracy can be inferred from the established facts as to Appellees' conduct.

This case must be governed by well known rules. Appellants may rely only upon reasonable inferences from proven facts and not upon speculation, surmise or conjecture. There was no parallel conduct; however, proof of conscious parallel conduct, assuming, *arguendo,* it exists here, does not establish the fact of conspiratorial agreement.

A. Plaintiffs Did Not Adduce Evidence in Proof of the Asserted Conspiracy to Boycott Plaintiffs for the Purpose of Maintaining List Prices, and the Evidence Affirmatively Refutes the Existence of Such Claimed Conspiracy.

The central theme of Appellants' argument is that there was a conspiracy to boycott Manfree for the purpose of insuring the maintenance of a list price structure below which major household appliances and television sets could not be sold.[5] The claim of Appellants is that Manfree sold and proposed to sell below suggested retail prices and, for this reason, was conspiratorially denied access to the products of the supplier defendants.[6] Despite the many assertions in and references throughout Appellants' Brief to the claimed conspiracy to boycott for the purpose of maintaining the defendant suppliers' suggested retail prices in the advertising and sale of the affected brands, Appellants not only failed to introduce evidence to support the existence of a conspiracy but also did not introduce evidence that any uniform pricing program existed.

The only evidence of *specific* prices at which any product lines here involved were *actually* advertised and offered for sale was adduced through the testimony of Mr. John Mitchel. This evidence which will be discussed

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[5]The furnishing of retail price lists does not create a permissible inference of conspiracy even if dealers sell at the suggested prices.

Klein v. American Luggage Works, Inc., 323 F. 2d 787-791 (3rd Cir. 1963).

[6]Representatives of Manfree testified that the following retailers, all of whom were Maytag dealers [Pl. Ex. 641], sold at discount prices and below suggested retail prices: Lambert Home Furnishings, House of Karlson, Cherin, Young Bros., Balboa Furniture, Brown Furniture, Dulfers [Tr. 5648-5649; 6005-6006].

infra, affirmatively shows that during 1959, the year in which Maytag is claimed to have joined the asserted conspiracy, defendants Hale and Sterling and four other San Francisco retailers who were not claimed to be conspirators, consistently and extensively advertised Maytag products at retail prices substantially different from and lower than Maytag suggested list prices and were reimbursed for that advertising by Maytag under its cooperative advertising program.

Apart from the Mitchel evidence, there is nothing in the record as to specific prices quoted in dollars and cents at which San Francisco area retailers advertised and sold relevant brands.[7] Thus, Appellants, have failed to show any particular instance of a sale by a defendant retailer at list price.

As to the general policy of the defendant retailers and without reference to specific prices, the record is uncontravened that as a matter of practice defendant retailers sold at below suggested retail prices [Tr. 901; 1183; 1453; 2352-2353; 3289; 3333; 4085-4086; 5029; 5646; 5648-5649].

Likewise, the testimony is uncontradicted without reference to specific amounts that advertising by the defendant retailers was frequently below list prices [Tr. 209; 430; 729-730; 1321; 1431-1433; 1450; 1515-1516; 2352-2353; 5646].

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[7]There is a notable example of Hale's not following Maytag's suggested retail prices in a Maytag price list taken from Hale's files [Pl. Ex. 4346-B]. Figures written in the hand of Mr. Sanford of Hale on said exhibit show the difference between Maytag's suggested retail prices and Hale's retail prices. The suggested retail price is given first, followed by the Hale retail price:

$389.95-$359.95; $229.95-$219.95; [Tr. 719-722].

$269,95-$239.95; $289.95-$259.95;

That the conspiracy claimed by appellants to boycott Manfree for the purpose of maintaining list prices is nothing more than a myth is precisely documented and demonstrated by retailers' advertisements in San Francisco newspapers in 1959, showing Maytag items offered for sale at below list prices. These advertisements were run by defendants Hale and Sterling and by non-conspirators Butler Brothers, Cherin's, Mac's Appliance Company (sometimes known as West Coast Washing Machine Company), and Young Brothers. The following exhibits are the advertisements referred to [DMT Ex: 1034-1038 Butler Brothers; 1039-1041 Cherin's; 13043-13047, 13049-13054A; 13059A-13060 Hale; 13069-13070 Sterling; 13074-13077 Mac's Appliance Company-West Coast Washing Machine Company; 13090-13097 Young Brothers]. The testimony of Mr. Mitchel, the Maytag West Coast Regional Manager in the San Francisco area, identifying the Maytag models displayed in the advertisements and his verification of the fact that the advertising was below list prices, is found in the record at Tr. 3383-3404.

Of extreme significance is the documentary evidence in the form of Credit Memos showing that as to each of the advertisement exhibits offering Maytag products at less than list prices, cooperative advertising funds were furnished the dealer by Maytag [DMT Ex: 13098-13100 Butler Brothers; 13101-13104 Cherin's; 13105-13112, 13114 Hale; 13120-13121 Sterling; 13124-13127 Mac's Appliance Company-West Coast Washing Machine Company; 13133, 13135, 13136, 13138-13140 Young Brothers.] Mr. Mitchel's testimony as to supplying advertising funds to Maytag dealers who advertised Maytag appliances at below list prices is at Tr. 3383-3404.

That Maytag would, if it were insistent upon maintaining a program of having its line sold at list prices, supply advertising funds to those who sold below such prices, goes beyond credibility.

Appellants would attach some significance to the following language in the Maytag cooperative advertising contract:

> "4. Distributor will not pay for classified advertising, advertising containing unauthorized price reductions, advertising that is misleading or false in any way, . . ."

Mr. Mitchel's uncontradicted testimony is that this provision of the cooperative advertising contract was never enforced with anybody [Tr. 3339]. There is no testimony, except as to one unique instance, that there was any discussion between any retailer and Maytag as to price advertising or the form the advertisement was to take. There is no contradiction of Mr. Mitchel's testimony that with respect to advertising of the Maytag line, the extent of his participation was authorizing dollars for that purpose and supplying retailers with mats and product information for their ads. His testimony in this regard is, "But beyond that I had no control over them" [Tr. 3342]. The single exception we have mentioned was in connection with a Maytag cooperative advertising contract with Hale concerning the advertising of a combination washer-dryer [Pl. Ex. 337]. Mr. Thomas, the Hale representative, and Mr. Mitchel were each of the view that because this appliance was extremely expensive, price advertising would not be feasible from a marketing standpoint. Plaintiffs' Exhibit 337, by the very language written therein, supports the fact that Maytag did not demand adherence

to list prices. The language referred to is "Advertisements *not* to show list price or *cut-price,* but will show only X number of dollars per week." (Emphasis added as to "cut price").

As to the Credit Memos which were received as exhibits and referred to above or with respect to any other advertising allowances granted by Maytag, there is not a shred of evidence that Maytag limited the allowance of advertising funds to those situations in which list prices would be followed.

The *sine qua non* of an actionable conspiracy to boycott, having as its objective the adherence to a list price structure, is a showing that there was in fact price maintenance. There is nothing in the evidence to show that there was any attempt to require such adherence to list price advertising or selling of the Maytag line.

Stripped of the fanciful creation of the asserted conspiratorial boycott for the purpose of maintaining list prices, the refusal of Maytag to deal with Manfree adds up to exactly nothing, except an unilateral decision not to renew the Manfree franchise based upon valid business reasons, which are clearly understandable, which will be discussed under heading B, *infra.*

B. The Non-Renewal of the Manfree Franchise Was Motivated by Legitimate Business Aims.

As related above (p. 3, *supra*). Mr. Mitchel came to the San Francisco area as a salesman for Maytag West Coast Company in January of 1959 [Tr. 3310], and became acquainted with Maytag dealers [Tr. 3311]. Mr. Mitchel's desire was to improve the Maytag penetration of the market [Tr. 1112] which had been disappointing [Tr. 3320]. Maytag's line, being more ex-

pensive than those of its competitors, could not compete on the basis of price [Tr. 3377-3378]. Consequently, it was necessary to enlist the help of salesmen engaged by retail dealers who were willing to be educated as to the superior quality of Maytag [Tr. 3376-3377]. These salesmen, in turn, would then be able to convince potential customers interested in the Maytag line of its superiority. Mr. Neermann, the principal Manfree salesman, was unwilling to be so educated [Tr. 3376-3377, 3422, 3425, 3427].[8]

Additionally, in Mr. Mitchel's words, Mr. Neermann smelled like a distillery [Tr. 3376-3377, 3425], which condition was evident on the three to four occasions on which Mr. Mitchel visited Mr. Neermann [Tr. 3377].[9]

Corroboration of Mr. Neermann's drinking habits was furnished by Mr. Marvin Boyd, the Manager of Manfree [Tr. 5534]. Mr. Boyd testified as follows [Tr. 5655-5656]:

"By Mr. Johnston:

Q. Mr. Boyd, were you acquainted with Mr. Arnold Neermann? A. Yes, I was.

Q. He was a salesman for Manfree, was he not? A. Yes, he was.

Q. Did you ever receive any complaints from your customers about his drinking?

Mr. Keith: Your Honor, we would urge that this is irrelevant, immaterial.

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[8]The manager of Manfree, Mr. Boyd, testified that there was no training program for sales personnel of Manfree with respect to the sale of household appliances or television sets [Tr. 5639-5640].

[9]Appellants' assertion that Mr. Mitchel did not mention Mr. Neermann's drinking habits in his deposition (Op. Br. 122), is one example of many misstatements of the record occurring in Appellants' Opening Brief. Mr. Mitchel testified in his deposition that Mr. Neermann smelled like a distillery [Tr. 3425].

The Court: Overruled.

Mr. Keith: No foundation.

The Court: Overruled. All goes to the—may go to the question or factor that prompts or does not prompt the refusal to sell. I don't know. Go ahead. There's been testimony heretofore on this subject.

The Witness: What was the question, please?

Mr. Johnston: Would you read the question, Mr. Reporter.

(Question read by the reporter.)

The Witness: We had some general complaints on it.

Mr. Johnston: About his drinking?

The Witness: That he had alcohol on his breath.

Mr. Johnston: Q. You reported this to Mr. Freeman, didn't you? A. Yes, I did.

Q. You knew that Mr. Freeman told Mr. Neermann to quit drinking on the job; isn't that right? A. Yes.

Q. As a matter of fact, Mr. Neermann was discharged, wasn't he, for showing up drunk at the job? A. Yes, he was."

Mr. Mitchel was of the opinion that a closed-front membership operation did not offer the potential that a retail store open to the public did, and that it was his view that Maytag products should be available to anyone who wished to purchase them without regard to his being a member of a particular group [Tr. 3379, 3428].[10]

[10]There is no evidence in the record of a demand for Maytag items in connection with Manfree's operation as a non-member-

(This footnote is continued on the next page)

The three reasons Mr. Mitchel testified to for not renewing the Manfree franchise [Tr. 3379], were a legitimate exercise of business judgment.

In contrast with Mr. Neermann's unwillingness to receive information as to the Maytag line, the Hale salesmen had no such reluctance after Mr. Mitchel came to the San Francisco area [Tr. 3318-3319].

A refusal to deal based on legitimate business reasons is not in violation of the antitrust laws.

In *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), the plaintiff, a motion picture theatre exhibitor, brought a treble damage action under the antitrust laws claiming a conspiracy among distributors and exhibitors of motion pictures to deprive him of product. The District Court granted the defendant's motion for a directed verdict at the conclusion of plaintiff's case. The language of the Court of Appeals in affirming the trial court is appropriate here, pages 305-306:

> "In addition, there was considerable documentary evidence, not challenged or answered, indicating that 'plaintiff was a difficult, if not unreliable, man with whom to transact business.' As a whole the record seems at least as consistent with legitimate business decisions by the distributors in favor of the Garden or the Lawler as with a planned exclusion of plaintiff from the first-run market."

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ship retailer (Op. Br. 74-76). Plaintiff's counsel withdrew his offer of Exhibit for Identification 4165 page 46, *infra*. In the absence of a demand, there cannot be a refusal to sell. *Royster Drive-In Theatres v. American Broadcast, Etc.*, 268 F. 2d 246, 251 (2nd Cir. 1959) cert. den. (1959) 361 U.S. 885; *Brown v. Western Massachusetts Theatres Inc.*, 288 F. 2d 302, 305 (1st Cir. 1961); *Webster Rosewood Corp. v. Schine Chain Theatres Inc.*, 263 F. 2d 533, 536 (2nd Cir. 1959) cert. den. (1959) 360 U.S. 912.

In *Alpha Distributing Co. of Cal. v. Jack Daniel's Distillery,* 207 F. Supp. 136 (N.D. Cal. 1961) aff'd per curiam 304 F. 2d 451 (9th Cir. 1962), it was claimed by plaintiff that defendants had violated the antitrust laws in that plaintiff was deprived of its distributorship by the defendants' supplier. In denying an injunction *pendente lite,* the District Court said at page 138:

> There is no requirement of defendants "to indefinitely entrust the marketing of their product in a wide area to a distributor with whom a relationship of confidence and cooperation has become impossible."

In *Deltown Foods, Incorporated v. Tropicana Products, Inc.,* 219 F. Supp. 887 (S.D.N.Y. 1963) which was an action under the antitrust laws involving a cancellation of a distributorship, the Court said at page 890 in denying plaintiff's application for a preliminary injunction:

> "The essence of defendants' position is that all that is involved here is a refusal to deal, which was justified because of the damage plaintiffs could do to defendants' product by treating it as second best while promoting their own private brand over Tropicana. Such refusal to deal, defendants say, is not unreasonable nor in violation of the antitrust laws, citing Dehydrating Process Co. v. A. O. Smith Corp., 292 F. 2d 653, 657 (1st Cir), cert. denied, 368 U.S. 931, 82 S. Ct. 368, 7 L.Ed. 2d 194 (1961), where Judge Aldrich stated: 'As we have had occasion to observe before * * *, the antitrust laws do not require a business to cut its own throat.' "

See also *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656, 667 (9th Cir. 1963), cert. den. 375 U.S. 922 (1963).

Additionally, Mr. Mitchel decided not to renew twenty to thirty other franchises, including those of defendants Lachman Bros. and Sterling Furniture, which were to expire at the same time as the Manfree franchise [Tr. 3332-3333, 3430]. The fact that Maytag's conduct was not aimed solely at Manfree dispels any possible inference of conspiracy. *Independent Iron Works, Inc., supra,* page 664.

C. There Was No Parallel Conduct by Defendants.

Plaintiffs charged a heterogeneous group with a conspiracy to boycott. It is difficult to conjure up Maytag, which is exclusively in the laundry appliance business (Op. Br. 8), conspiring with those who are exclusively in the television and electronics business, such as Motorola, Inc. [R. 7], Radio Corporation of America (Op. Br. 10), Sylvania Electric Products, Inc. [R. 6], Zenith Radio Corporation [R. 7].

Absence of parallelism is demonstrated by the following. Some distributors sold to Manfree. Others did not. Those that did sell did so for non-identical periods [Pl. Ex. 1523]. Plaintiffs' Exhibit 1523 shows the diverse time periods during which alleged co-conspirators dealt with Manfree: Defendant Lancaster stopped selling to Manfree in November of 1957 and Maytag did not commence selling to Manfree until January of 1958. Graybar Electric Co., an alleged co-conspirator (Op. Br. 8), the distributor of the Hotpoint line manufactured by defendant General Electric, commenced selling Manfree in May of 1957 and

ceased selling it in October of 1958. Defendant Frank L. Edwards Co., the distributor of defendant Sylvania's products, started selling to Manfree in July of 1957 and terminated its dealings with Manfree in May of 1958. Defendant California Electric Supply Company began selling defendant Philco's products to Manfree in May of 1957 and stopped selling in September of 1958 [Pl. Ex. 1523].

Defendant Macy's bought no units from Maytag in 1960 [Pl. Ex. 641]. Defendant Redlick purchased nothing from Maytag in the years 1960, 1961 and 1962 [Pl. Ex. 641].

It will be remembered that Maytag did not renew the Manfree franchise which expired on May 31, 1959 [Tr. 3375].

The evidence above referred to negates a conspiracy to boycott by the defendants. If Macy's or Redlick exerted pressure on Maytag to discontinue its business relationship with Manfree, why then did they not purchase from Maytag after it ceased to deal with Manfree.

The non-similarity of conduct of alleged co-conspirators was held to be significant evidence of non-conspiratorial conduct in *Dipson Theatres v. Buffalo Theatres,* 190 F. 2d 951, 954 (2nd Cir. 1951) cert. den. 342 U.S. 926 (1952), and in *Brown v. Western Massachusetts Theatres, Inc.,* 288 F. 2d 302, 305-306 (1st Cir. 1961).

Appellants have cited three cases in support of their assertion that cancellations which are not exactly simultaneous do not detract from parallelism (Op. Br. 129-130):

Standard Oil Co. of California v. Moore, 251 F. 2d 188, 196-204, 205-211 (9th Cir. 1957), cert. den. 356

U.S. 975 (1958); *Bordonaro Bros. Theatres v. Paramount Pictures,* 176 F. 2d 594, 596-597 (2nd Cir. 1949); *Interstate Circuit Inc. v. United States,* 306 U.S. 208 (1939).

We do not contend that parallelism must be precisely identical, however, by the very definition of the term, at least similarity of conduct must exist. In the *Moore* case refusals to deal occurred within a month of each other, pages 206-207. In the *Interstate* case the Court observed that a conspiracy may be formed by other than simultaneous action or agreement. However, in using this language, we believe the Court was referring to something other than parallel conduct to attempt to prove a conspiracy. The pertinence of the *Bordonaro* case is not apparent.

The asserted conspiracy, except as to Maytag, according to plaintiffs, is known to have existed in May of 1957 as appears from the answers to Maytag's interrogatories (Appellants Specification of Errors, P. xxxi). Appellants cannot rely upon parallel conduct to show the establishment of a conspiracy in 1957, for no parallelism existed at that time. The formation of the asserted conspiracy then must be predicated on other purported acts and as to those there is no evidence.

D. Assuming, Arguendo, Parallelism Existed, There Was No Consciousness of It on the Part of Maytag.

Mr. Mitchel testified that he didn't know what brands were being displayed by Manfree [Tr. 3357]. Mr. Mitchel's testimony was not contravened.

In *United States v. Standard Oil Co. (Ind.), et al.,* Cr. 2199 (N.D. Ind. 1964), *A.B.A. Jury Instructions*

in Criminal Antitrust Cases, 412, 432 [1965], which was a criminal prosecution for violation of the Sherman Act, the Court gave the following instruction to the Jury at page 432:

> "However, it is necessary that a party have knowledge of the existence of a conspiracy before he can become a party to it. A person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of a conspiracy, does not by such conduct become a conspirator. A party cannot knowingly participate in a conspiracy unless he is aware of it and acts in a common understanding with the other parties to further its purpose."

Assuming a plaintiff could establish a conspiracy through parallel conduct, it would be essential to show knowledge of such parallelism for one to become a party to the conspiracy under the rule of the case cited immediately above.

Indeed, what has been said as to lack of knowledge by Maytag of parallelism extends in this case beyond that, for there is no evidence of Maytag's knowledge of any conspiracy whether it is attempted to be proved by claimed parallel conduct or otherwise.

E. Assuming, Arguendo, Conscious Parallelism Existed, Such Is Not Proof of a Conspiracy.

The committing of similar acts by several persons knowing of such similarity does not prove conspiracy.

In *Theatre Enterprises v. Paramount,* 346 U.S. 537 (1954), the Supreme Court held (pp. 540-541):

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independ-

> ent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *United States v. Masonite Corp.,* 316 U.S. 265 (1942); *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946); *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948). But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

Parallelism in business conduct, even where it is conscious and with knowledge of the manner in which others act, does not prove a conspiracy. The Court so held in granting a motion for a directed verdict in *Independent Iron Works, Inc. v. United States Steel Corp.,* 177 F. Supp. 743, 746-747, (N.D. Cal. 1959) affirmed (9th Cir. 1963) 322 F. 2d 656, cert. den. (1963) 375 U.S. 922:

> "* * * there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action. Proof of parallel business conduct is not a sub-

> stitute for proof of conspiracy, and similar conduct, as such, does not establish conspiracy. * * * The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

The District Court was affirmed by the Court of Appeals which held that conscious parallelism standing by itself cannot support an inference of conspiracy (322 F. 2d 661):

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. * * * Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present 'under circumstances which logically suggest joint agreement, as distinguished from individual action.'"

In *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), the Court made the following apt observation regarding the significance of conscious parallelism, page 305:

> "Plaintiff's petition for rehearing suggests that he has not fully understood our opinion with regard to conscious parallelism. Whatever this term means, it must be something more than mutual awareness of similar conduct. This awareness must be an element entering into each party's decisional process, and the basis for inferring that it

did so must be something more substantial than a guess. For everyone to run out of the building when there is a cry of 'Fire,' or to stand in a queue at a bus stop, is not conscious parallelism."

F. The Specific Charges of Appellants Are Not Evidence of a Conspiracy.

1. The Sale of Merchandise to Hale by Maytag in February of 1959 Is Not Evidence of a Conspiracy.

In February of 1959 Maytag sold Hale $10,848.00 of merchandise. Although it is our position that such a sale has no probative value because it occurred before the date plaintiffs claimed Maytag entered into the asserted conspiracy, to wit, April 30, 1959, which subject will be discussed *infra,* pages 49-51, however, assuming such evidence has a place in this case, it does not prove a conspiracy.

During the years 1958 through 1962 Maytag sold to more than 45 dealers in the San Francisco area [Pl. Ex. 641, 4161]. Of these only five are named as co-conspirators.

A supplier is privileged to prefer one customer over another, and the act of so doing does not establish a conspiracy.

In *Hudson Sales Corp. v. Waldrip,* 211 F. 2d 268 (5th Cir. 1954) cert. den. 348 U.S. 821 (1954), it appeared that the District Court had found a conspiracy in violation of the antitrust statutes, in that an automobile dealer was required to give up dealerships for makes of cars other than Hudson. The Court of Appeals reversed the lower court, saying at page 274:

> "Plaintiff had no tenure, no right to a renewal of his contract as master dealer. Defendant, on

> the other hand, had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under Section 15, even if the evidence had shown, which it did not, that the defendant had done so only because plaintiff had refused to give up in the future his other agencies and center his efforts on, and give his undivided attention to, Hudson and Hudson products."

In *Schwing Motor Company v. Hudson Sales Corporation,* 138 F. Supp. 899 (D. Md. 1956), another automobile dealership case similar to the one immediately above, the Court dismissed plaintiff's complaint, holding at page 903:

> "A manufacturer may prefer to deal with one person rather than another, and may grant exclusive contracts in a particular territory. Windsor Theater Co., v. Walbrook Amusement Co., 4 Cir., 189 F. 2d 797. Unless his contract so provides, a dealer once appointed has no tenure, no right to a renewal of his contract."

The *Schwing* case was affirmed in a memorandum opinion *sub nomine, Schwing Motor Company v. Hudson Sales Corporation,* 239 F. 2d 176 (4th Cir. 1956), cert. den. 355 U.S. 823 (1957).

In *Windsor Theatre Co. v. Walbrook Amusement Co.,* 189 F. 2d 797 (4th Cir. 1951), the Court said at page 799:

> "This Court cannot see how the preference of one exhibitor over another is, *per se,* a combination in restraint of trade."

The cases cited at pages 18-20, *supra,* are also pertinent here.

2. The Furnishing of Advertising Allowances to Dealers Is Not Evidence of a Conspiracy.

Hale was furnished a substantial advertising allowance by Maytag in February of 1959. The supplying of advertising allowances to dealers other than Manfree is no more conspiratorial than sales to other dealers. That Maytag provided advertising funds, however denominated, to many retailers in the San Francisco area [DMT Ex: 13098-13100; 13101-13104; 13105-13112, 13114; 13120-13121; 13124-13127; 13133, 13135, 13136, 13138-13140; Tr. 3343, 3345, 3367], is not proof of the conspiracy charged by plaintiffs. The furnishing of so called special advertising funds was not limited to the retailer defendants [Tr. 3345, 3367].

Without discussion of the question that a vendor may condition the use of advertising funds upon the maintenance of suggested retail prices, plaintiffs fail to show that Maytag indulged in any such conduct. Indeed, the evidence of Maytag supplying advertising funds to those selling below suggested retail prices is a complete refutation of any possible charge that Maytag was attempting to enforce adherence to list prices through the use of advertising funds, regardless of the appellation given such funds (page 13 *supra*).

3. The Increased Purchases of the Maytag Line by Hale After the Non-Renewal of the Manfree Franchise, Are Not Evidence of a Conspiracy.

Contrary to Appellants' assertion that Hale made no purchases from Maytag in the year 1958 (Op. Br. 46-47), Plaintiffs' Exhibit 641 shows the purchase of fifty-two (52) units in that year. Admittedly Hale made larger purchases in subsequent years. The fact

that fewer Maytag units were purchased in 1958 by Hale than thereafter or theretofore, was the natural consequence of the disenfranchisement of Hale by Maytag in 1958 [Tr. 1102-1104].[11] The reason given by Mr. Sanford of Hale for the disenfranchisement was poor performance by Hale [Tr. 1102, 1108-1109]. When Maytag cancelled the Hale franchise in 1958 its sales representative was Mr. Fenn Wilson [Tr. 1108-1109]. After Mr. Wilson's successor, Mr. Mitchel, assumed the position of regional manager, he made intensive efforts to interest the sales personnel of Hale in the Maytag line [Tr. 3318-3319, 3321-3322, 3327-3328]. It is properly inferable that these efforts bore fruit in the increased purchases by Hale of Maytag items.

Again, the decision on the part of a supplier to deal with a particular customer is not proof of a conspiracy (pages 18-20, 26-27, *supra*).

4. There Is No Evidence That Maytag Was in Any Way, Individually or Collaboratively, Involved in the Plaintiffs' Claimed Inability to Advertise in San Francisco Newspapers.

Appellants have failed to point to any portion of the record which evidences implication of Maytag in the as-

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[11]Appellants claim that Hale did not advertise Maytag in 1958 (Op. Br. 37, 90, 113) and, in "proof" of this, refer to Pl. Ex. 4153. Said exhibit refers only to instances of cooperative advertising funds being supplied Hale [Tr. 1119], and is not proof that Hale did not advertise Maytag at Hale's sole expense. The evidence is undisputed that Hale did advertise Maytag during a portion of the year 1958 [Tr. 1096-1097].

The significance of not furnishing cooperative advertising funds is not apparent when it is noted that Pl. Ex. 4153, which begins with March, 1957, shows no cooperative advertising furnished Hale from March, 1957 through September 1957, which period antedates the time when Maytag started to deal with Manfree in January, 1958 [Pl. Ex. 1523]. Hale purchased 187 units from Maytag in 1957 [Pl. Ex. 4161].

serted inability of the plaintiffs to advertise in certain San Francisco newspapers.

There is no evidence that Maytag supplied advertising funds to Manfree on the condition that it would not advertise in a particular newspaper. The policy of price advertising by Manfree insofar as Maytag was concerned was no different than with any other dealer [Tr. 3341-3342].

5. The Evidence Regarding Trade Associations Does Not Make Out a Prima Facie Case of Maytag's Participation in the Alleged Conspiracy.

a. *Membership in Trade Associations and Participation in Their Activities Are Not, as Such, in Violation of the Antitrust Laws.*

Maple Flooring Mfrs. Asso. v. United States, 268 U.S. 563 (1925);

District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Ass'n., 83 F. Supp. 994, 998 (D.D.C. 1949).

In *United States v. The Sherwin-Williams Co., et al.,* Cr. 12789 (W.D. Pa. 1948), *A.B.A. Jury Instructions in Criminal Antitrust Cases* (1965) 267, at page 294 the Court stated the law to be as follows in instructing the jury:

> "I mean by this that a membership in any trade association is not unlawful in itself. There is no law which makes it unlawful for the defendants to be members of any trade association which has been mentioned in the testimony, or to participate in their committees, their meetings, or their activities."

Admittedly The Maytag Company was a member of American Home Laundry Manufacturers Association, commonly known as AHLMA, and certain of The Maytag Company representatives participated in some of the activities of AHLMA. It should be mentioned that Appellants do not contend Maytag was a member of National Electric Manufacturers Association (NEMA) [Tr. 3494], of Electric Industries Association (EIA) (Op. Br. 74), of Northern California Electrical Bureau (NCEB) (Op. Br. 108), nor of the San Francisco Better Business Bureau (BBB) (Op. Br. 108).

There is no evidence that U.S.E. or Manfree or any of the defendant retailers were the subject of discussion at AHLMA meetings. The following significant testimony of Mr. Ely, an officer of Maytag, of what transpired at AHLMA meetings regarding this subject is uncontravened: [Tr. 3502-3503].

> "Q. Now, did there ever come to your attention a discussion of the discount store picture, or the problems, Mr. Ely, the subject matter that certain department stores would not buy merchandise if they were being sold to discount stores? A. No.
>
> Q. That never arose? A. No."

Trade associations at most may provide an opportunity to conspire, but they cannot be a substitute for proof of the essential elements of a conspiracy.

Maple Flooring Mfrs. Asso. v. United States, 268 U.S. 563, 586 (1925.)

See

United States v. Penn-Olin Chemical Company, 217 F. Supp. 110, 133-134 (D. Del. 1963).

The guilt by association concept is not recognized in our law. The following statement in the *Penn-Olin* case is pertinent (pages 133-134):

> "A finding of illegality in this area, if it is to be made, must rest upon an inference that a substantially lessening of competition between Pennsalt and Olin in non-chlorates will probably result because of the opportunity which their representatives have to make anticompetitive agreements when they meet in connection with Penn-Olin's affairs. Such an inference is incompatible with the holding in Maple Flooring Mfrs' Ass'n. v. United States, 268 U.S. 563, 45 S.Ct. 578, 69 L. Ed. 1093 (1925)."

b. *Plaintiffs' Exhibit 2, The AHLMA Code, Is Not Evidence of a Conspiracy.*

The Appellants attempt to attach some conspiratorial significance to a booklet issued by AHLMA bearing the date June, 1960, entitled Recommended Advertising Practices for the Home Laundry Appliance Industry [Pl. Ex. 2].

Appellants assert that Maytag required retailers to sign affidavits that they had engaged in no comparative price advertising and cite in support of this certain exhibits and exhibits for identification (Op. Br. 108). Of the exhibits referred to only one, Plaintiff's Exhibit 2, has any connection whatsoever with Maytag. Plaintiff's Exhibit 2 can be searched in vain for any requirement that Maytag, or any other manufacturer of laundry appliances, required retailers to sign affidavits that they had not engaged in comparative price advertising.

An examination of Plaintiff's Exhibit 2 will demonstrate that it was an honest attempt to follow the precepts of the Federal Trade Commission and, in fact, of the total of the sixteen pages in the exhibit, eleven are devoted to a reprint of guides adopted by the Federal Trade Commission, and furthermore, the introductory page contains the following language [Pl. Ex. 2; Tr. 3513-3514]:

> "'AHLMA's Recommended Advertising Practices are intended to be consistent with these Federal Trade Commission publications and to provide a guide in layman's language to certain specific situations in the home laundry appliance industry. AHLMA's Recommended Advertising Practices are not intended to replace or to be a digest of the Federal Trade Commission publications.
>
> "It is urged that the Federal Trade Commission publications as well as AHLMA's Recommended Advertising Practices be carefully studied and kept in mind at all times.'"

The AHLMA Code [Pl. Ex. 2] undertook to do nothing more than to encourage by the giving of examples, non-deceptive advertising and sales practices, It had nothing whatever to do with suggesting to retailers, or anyone else, to sell or not to sell at list prices. It is apparent that its purpose was only to be a guide in avoiding dishonest representations. The only significance of the phrase "list price" as used at pages 1 and 6 of Plaintiff's Exhibit 2 was to discourage the use of that term by an advertiser to indicate that a savings was available to a consumer when the advertised list price was not the usual and customary retail price.

It should be noted parenthetically that Appellants have again misstated the record in erroneously assert-

ing that the portion of Plaintiff's Exhibit 2 not prepared by the Federal Trade Commission is significantly different from the advertising practices recommended by the Federal Trade Commission, in that the Federal Trade Commission guides make no reference to list price (Op. Br. 73). At page 6 of Plaintiff's Exhibit 2, which is a reprint of Guide Against Deceptive Pricing issued by the Federal Trade Commission, we find the following:

> "Examples of phrases used in connection with prices which have been held to be representations of an article's usual and customary retail price are:
>
> *'Maker's List Price'*
>
> *'Manufacturer's List Price'*
>
> 'Manufacturer's Suggested Retail Price'
>
> 'Sold Nationally At'
>
> 'Nationally Advertised At'
>
> 'Value' " (Emphasis added)

The quotation from page 6 of Plaintiff's Exhibit 2, *supra,* expressly recognizes that a "list price" may be used in advertising.

It is evident from a reading of Plaintiff's Exhibit 2 that the first four pages thereof, which are not Federal Trade Commission material, constitute an effort to specifically apply general Federal Trade Commission guides to home laundry appliances. It will be noted in reading pages 6-8 of Plaintiff's Exhibit 2, that the guides there set forth and adopted by the Federal Trade Commission purport to cover product lines in general.

For instance, at page 7, there is a reference to a dacron suit, and at page 14 to tires.

The Appellants assert that the members of AHLMA agreed not to seek Federal Trade Commission review or approval of AHLMA's advertising code (Op. Br. 164). With respect to Appellants' assertion, the following uncontradicted evidence shows that the AHLMA Code was in fact submitted to and reviewed by the Federal Trade Commission with favorable comment [Tr. 3490-3491].

> "Q. Did you take this code to any officer of the Federal Trade Commission? A. I believe it was submitted to the Federal Trade Commission.
>
> Q. Did they approve it? A. I believe they complimented the industry, as I recall, for having done it."

c. *Assuming, Arguendo, That AHLMA and Its Members Were Engaged in a Conspiracy, It Was Not the Conspiracy Charged by Plaintiffs.*

As noted above, there is absolutely no evidence that AHLMA conspired to boycott the Appellants.

We would not devote space to this specious theory were it not for the possibility that Appellants may have tried to claim, although their language is extremely ambiguous, that trade associations were co-conspirators (Op. Br. 12). It should be noted further that the record references given in Appellants' Opening Brief, page 12, do not support this claim, if it is a claim.

AHLMA's membership included all of the manufacturers of home laundry appliances save one [Tr. 3484]. Omitted from this number, in the case at bench, as defendants or asserted co-conspirators are the following [Pl. Ex. 2, p. 4].

ABC
ARMSTRONG
BARTON
BLACKSTONE
DEXTER
EASY
HAMILTON
IRONRITE
KELVINATOR
KENMORE
LAUNDROMAT
LEONARD
O'KEEFE & MERRITT
ONE MINUTE
SPEED QUEEN
STIGLITZ
WARD'S SIGNATURE

If the AHLMA Code were the product of some conspiracy participated in by manufacturers of home laundry appliances, which is a completely unfounded assumption, that "conspiracy" is different than the one asserted by plaintiffs, in that of the 25 manufacturers whose names appear on Plaintiff's Exhibit 2, p. 4, the AHLMA Code, only 7 were claimed to be defendants or co-conspirators.

The asserted existence of conspiracy whose members are A, B, C and D, is not evidence of the existence of an asserted conspiracy whose members are A, X, Y and Z.

Steiner v. 20th Century Fox Film Corporation, 232 F. 2d 190, 196 (9th Cir. 1956);

Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. 2d 951 (2nd Cir. 1951) cert. den. 342 U.S. 926 (1952);

Paramount Film Distributing Corp. v. Village Theatre, 223 F. 2d 721, 727 (10th Cir. 1955);

Kotteakos v. United States, 328 U.S. 750 (1946).

6. There Was No Vertical Conspiracy Between Maytag and Hale.

Appellants have charged the existence of a vertical price fixing conspiracy between Hale and Maytag (Op. Br. 14).

Contrary to Appellants' assertion, the trial court did not limit Appellants to the proof of a horizontal conspiracy. The court's order [R. 1608-1609] contains no such restriction.

The conspiracy asserted by plaintiffs was one they claimed existed among manufacturers, distributors and retailers. A conspiracy among competitors is customarily termed a horizontal conspiracy.

> *Van Cise, Understanding the Antitrust Laws,* pp. 157-164 (1966).

Regardless of whether the plaintiffs choose to denominate the claimed conspiracy as horizontal or vertical, the result is the same. There was no conspiracy.

If Appellants intend to assert that there was a conspiracy between Hale and Maytag for the purpose of the maintenance by Hale of retail prices, it is not apparent how this could give rise to any additional claim by plaintiffs after the Manfree franchise was not renewed by Maytag.

If Appellants contend that there was a price maintenance scheme between Hale and Maytag and that to effectuate it Maytag refused to further deal with Manfree, all of what has been said *supra* regarding the lack of proof of a horizontal conspiracy also necessarily impels the conclusion there was no vertical conspiracy.

In further negation of the existence of such a vertical conspiracy, the following is significant.

There is no evidence that Hale nor any of the retailer defendants were treated any differently than the other retailers, approximately 45 in number, sold by Maytag after the non-renewal of the Manfree franchise. No claim was made of conspiratorial conduct on the part of any of said 45 retailers.

It is important to note again that twenty to thirty other franchises given by Maytag were not renewed at the same time that the Manfree franchise expired [Tr. 3332-3333, 3430]. Appellants do not assert that Hale and Maytag conspired to boycott these twenty to thirty dealers.

It would be more consistent with the existence of a vertical conspiracy between Hale and Maytag if plaintiffs had been able to demonstrate, which they could not, that Maytag dealt exclusively with Hale.

We repeat again that Maytag had the right to select its customers and to prefer to deal with one customer rather than another (pages 18-20, 26-27, *supra*).

II.

THE COURT'S EXCLUSION OF CERTAIN EVIDENCE WAS NOT ERROR.

A. Plaintiffs Stated That Maytag Became a Member of the Conspiracy on April 30, 1959.

In a sworn answer to interrogatories propounded by Maytag, plaintiffs stated the conspiracy, *of which Maytag became a member on April 30, 1959* was commenced prior to that time, and is known to plaintiffs to have existed in May 1957 [R. 958, 961]. A further portion of the answer may be found in Appellants' Specification of Errors, page xxxi.

Appellants complain of the exclusion of an asserted conversation between Mr. Bernard Freeman, an officer of plaintiffs, and Mr. John P. Mitchel, regional manager of Maytag West Coast, and of the exclusion of Pl. Ex. for Id. 565. The purported conversation occurred prior to April 30, 1959 [Tr. 5786-5787], and the document from what appears on the face of it, was prepared before that date [Pl. Ex. for Id. 565].

Heading G of Appellants' Brief at page 153 where this subject is treated reads as follows:

> "G. *The Court Committed Prejudicial Error In Excluding Evidence Proving The Participation Of Maytag In The Conspiracy To Boycott Appellants:*"

Plaintiffs' counsel at the trial reaffirmed the date of the claimed entry of Maytag into the asserted boycott conspiracy. At [Tr. 5784] there appears the following:

> "Mr. Johnston: The sworn answer is that Maytag became a member of the conspiracy on April 30, 1959.
>
> Mr. Keith: That would be true insofar as the boycott is concerned but not insofar as the Maytag control of pricing is concerned."

It should be noted that Appellants, in attacking the Court's ruling under heading G, *supra,* allude only to what they claim was a boycott conspiracy, and at page 153 of their Brief Appellants state:

> "This testimony related to the alleged reasons why Maytag would not sell to Manfree, and therefore the reasons why it chose to participate in the *boycott conspiracy.*" (Emphasis added).

In response to an inquiry from the Court, plaintiffs' counsel, with respect to the evidence he complains was excluded, stated the reason for tendering the evidence was that it was a conversation made by a co-conspirator in furtherance of the conspiracy. The following transpired [Tr. 6060]:

> "The Court: Mr. Keith, do you contend the conversation involved which you wish to offer in evidence is a conversation made by a co-conspirator in furtherance of the conspiracy?
>
> Mr. Keith: Oh, yes, Your Honor.
>
> The Court: And Mr. Mitchel is the co-conspirator?
>
> Mr. Keith: Yes, Your Honor.
>
> The Court: And he is an employee of whom?
>
> Mr. Keith: Maytag."

The Court in the exercise of its discretion properly excluded testimony by Mr. Freeman as to an asserted conversation with Mr. Mitchel antedating April 30, 1959, and also correctly refused to admit Pl. Ex. for *Id.* 565.

In *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F. 2d 656 (9th Cir. 1963) cert. den. 375 U.S. 922 (1963), plaintiff's case was based upon an asserted conspiracy to boycott. Plaintiff had given defendants a release with respect to acts occurring before 1955. It then offered evidence antedating this date. The Court held that the refusal to receive such evidence was not error and stated at pages 669, 670:

> "Part of such evidence consisted of proof of the manner in which U.S. Steel and Bethlehem had distributed steel to plaintiff and others prior to 1955, the period in issue. Plaintiff's counsel, at a

pre-trial conference, stated that this would be offered as collateral proof of plaintiff's charges of conspiracy and monopolization and that it related to 28 jobs carried on from 1950 through 1954. The judge, however, demurred, observing that the evidence was of limited use and that its introduction would require a tremendous amount of trial time. Thereupon counsel, stating that they could reduce the number, selected nine of the jobs initially proposed. However, the judge considered that nine were too many and, by pre-trial order, limited plaintiff to proof of two—the so-called 13th Street Freeway job undertaken by plaintiff in 1953, and the University of California Teaching Hospital job performed by the Moore Dry Dock Company.

"The admission of collateral evidence is a matter addressed to the discretion of the trial judge [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 230, 60 S.Ct. 811, 84 L.Ed. 1129 (1940)], and we are clear that here the rulings complained of did not constitute an abuse of discretion.

"In the words of Justice Holmes, the reason for excluding such evidence is 'a purely practical one, —a concession to the shortness of life.' Reeve v. Dennett, 145 Mass. 23, 28, 11 N.E. 938, 944 (1887). It is manifest from the transcript of the pre-trial conferences, where the subject was discussed at length, that an excursion into each of these incidental matters could and probably would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably. The

> Judicial Conference of the United States, in its Report on Procedure in Anti-trust and Other Protracted Cases (1951), has frowned upon a liberal exercise of judicial discretion in allowing collateral proof saying 'Such evidence as is merely "possibly helpful", or which merely supplies "atmosphere" or "background", may be rigidly excluded,' a view to which we heartily subscribe."

In *Independent Iron Works, Inc. v. United States Steel Corp., supra,* the Court also noted at page 669 that Kaiser, one of the defendants, was not asserted to be a party to the alleged conspiracy until after the acts constituting the proferred evidence took place.

Courts will not permit the relitigation of acts or conduct of defendants antedating a release.

> *Suckow Borax Mines Consol. v. Borax Consolidated,* 185 F. 2d 196, 206-207 (9th Cir. 1950), cert. den. 340 U.S. 943 (1951), reh. den. 341 U.S. 912 (1951);
>
> *Solar Electric Corp. v. General Electric Co.,* 156 F. Supp. 51, 58 (W.D. Pa. 1957).

If it is not error to exclude pre-release evidence when offered to establish a onspiracy following the release, then *a fortiori* the acts and declarations of Maytag prior to the date Appellants assert Maytag joined the asserted conspiracy were properly excluded.

Futhermore, as noted above, the testimony desired to be adduced was offered by plaintiffs on the ground it was in furtherance of the conspiracy (page 40, *supra*). Overt acts of a party occurring before that party joins a conspiracy cannot prove such party's participation in the conspiracy.

See *Marshall v. United States,* 355 F. 2d 999 (9th Cir. 1966) cert. den 385 U.S. 815 (1966), reh. den. 385 U.S. 964 (1966), in which the Court said at page 1004:

> "There is no question that the overt acts charged must effect the object to the conspiracy, and until the conspiracy comes into existence, no act occurring prior thereto can effect it."

In *Dahly v. United States,* 50 F. 2d 37, 42 (8th Cir. 1931), a criminal conspiracy case involving an attempt by defendants to bribe United States customs and narcotics officers, the Court stated at page 42:

> "Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together, *but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.*" (Emphasis added).

In *Steiner v. 20th Century-Fox Film Corporation,* 232 F. 2d 190 (9th Cir. 1956), the Court said at pages 192-193:

> "An overt act must accompany or follow the agreement, and must be done in furtherance of the object of it. Blumenthal v. United States, 9 Cir., 1946, 158 F. 2d 883, affirmed 1947, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154; . . ."

A word should be said concerning *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962). In the *Continental Ore Co.* case the plaintiffs in the trial court attempted to introduce evidence of a conspiracy and overt acts pursuant thereto in the early 1930's. Such evidence was excluded by the trial court on the ground that one of the plaintiff's did not arrive in the United States until 1938. The refusal to admit the tendered evidence was held to be error by the Supreme Court. Certainly the *Continental Ore Co.* case which was cited in *Independent Iron Works, supra,* at page 661 of the opinion does not stand for the proposition that evidence of acts prior to claimed participation in a conspiracy must be admitted.

B. There Was No Offer of Proof as to Mr. Freeman's Asserted Conversation With Mr. Mitchel.

The only offer of proof made as to Mr. Freeman's conversation with Mr. Mitchel was that plaintiff's counsel advised the Court that Mr. Freeman's testimony would explain a certain letter [Pl. Ex. 567], [Tr. 5786].

An offer of proof must be *specific,* as is set forth in *Fed. R. Civ. P. 43(c):*

> "(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a *specific* offer of what he expects to prove by the answer of the witness." (Emphasis added).

The function of an offer of proof is to enable an appellate court to determine whether error has been committed in excluding evidence.

In *Frisone v. United States,* 270 F. 2d 401 (9th Cir. 1959), the Court stated the following rule of law at page 402:

> "The purpose of an offer of proof is to make a record so that an appellate court can get a clear idea of whether error has been committed in sustaining objections to questions asked."

Simply stating that testimony is going to explain a letter could not possible enlighten this Court on the question of whether or not error had been committed.

C. Certain Evidence Was Properly Excluded for Reasons Other Than Maytag's Assertedly Becoming a Member of the Claimed Conspiracy on April 30, 1959.

Appellants assigned error in the exclusion of the following documents; Plaintiff's Exhibits for *Id.* 565, 4165, 1079 and 1089.[12]

Plaintiffs' exhibit 565 antedated Maytag's asserted entry into the alleged conspiracy April 30, 1959, and for the reasons herein stated was without probative value. However, valid independent grounds were urged and sustained by the Court in its rulings excluding the documents.

With respect to Plaintiffs' Exhibit for *Id.* 565, a handwritten document, the ruling of the Court based upon counsel's objection that there was no foundation

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[12]The pertinence of Pl. Ex. for Id. 1089 is not apparent. This document is a Credit Memo of Maytag giving Hale a credit of $12.00 by reason of incorrect invoicing of a prior purchase.

[Tr. 3341-3343] was correct. Appellants have failed to point to any portion of the record in which the handwriting upon Plaintiffs' Exhibit for *Id.* 565 was identified.

The authentication of a writing requires proof that it was written by the person who purported to write it. *Witkin, California Evidence,* sections 672 and 673 (2d Ed. 1966).

As to Plaintiffs' Exhibit for *Id.* 4165, counsel for plaintiffs withdrew his offer of this document [Tr. 5791-5792].

With respect to Plaintiffs' Exhibits for *Id.* 1079 and 1089, the witness through whom they were attempted to be introduced, Mr. Sanford of Broadway-Hale, and not seen the documents before being shown them in Court [Tr. 1120]. The Court suggested that counsel for plaintiff reserve his offer until Mr. Mitchel of Maytag West Coast took the stand [Tr. 1122]. Counsel for plaintiff did not offer the documents through Mr. Mitchel. The Court properly exercised its discretion in deferring the tender in evidence of these documents for the reason that a foundation for the introduction could not likely be established through a witness who had never seen the documents.

The trial court has absolute jurisdictional discretion as to the order of proof.

> *Flintkote Co. v. Lysfjord,* 246 F. 2d 368, 378 (9th Cir. 1957), cert. den. 355 U.S. 835 (1957).

D. The Exclusion of Certain Portions of the Alpine Deposition Was Not Error.

The District Court was correct in ruling that certain portions of the Alpine deposition should not be read into evidence, as is competently and thoroughly discussed in the Brief of Appellees General Motors Corporation and Frigidaire Sales Corporation, under heading V-A(3), to which reference is made.

With respect to Maytag, Appellants complain of the Court's refusal to permit the reading into evidence of pages 235-238 of the Alpine deposition (Appellants Specification of Errors p. xxv). An examination on this portion of the Alpine deposition discloses that Mr. Alpine purportedly had two conversations with Mr. Mitchel, and that notes or reports of these conversations were made [Dep. 238]. These notes or reports were not made available for inspection by counsel for the defendants until after the death of Mr. Alpine [Tr. 6216].

The lack of opportunity to cross-examine Mr. Alpine as to the notes of the conversations deprived Maytag of its right to test, among other things, the credibility of Mr. Alpine's testimony as is evident from what transpired at the deposition. Mr. Alpine testified that he made notes of conversations with distributors of major household appliances if he thought there was something discriminatory or harmful being done [Dep. 238].

The first of the two asserted conversations was to the effect that Mr. Mitchel told Mr. Alpine Manfree was considered one of Maytag's better Northern California accounts [Dep. 236]. Mr. Alpine was asked by

counsel as to whether this purported conversation, of which a note was made, suggested something harmful or discriminatory [Dep. 238, 239]. The witness was instructed by his counsel not to answer this question [Dep. 239], and a similar question as to why the witness made notes of the purported conversation [Dep. 239]. How the asserted statement that Maytag was one of Manfree's better accounts in Northern California was harmful or discriminatory is not apparent. Examination of Mr. Alpine as to this conversation with the advantage of having his report thereof, would have given defendants an opportunity, to which they were entitled, of developing testimony as to the credence which should be accorded Mr. Alpine.

Another example of the importance of having the notes in hand for cross-examination, is the testimony of Mr. Alpine that the first conversation he claims to have had with Mr. Mitchel took place five or six months after Manfree had been doing business with Maytag [Dep. 236, 237]. Mr. Alpine placed this time, *after looking at the reports*, as being in late 1958 [Dep. 237]. Plaintiffs' Exhibit 1523 shows that Maytag commenced doing business with Manfree in January of 1958. Mr. Mitchel testified that he came to the San Francisco area on January 1, 1959 [Tr. 3310]. As acknowledged by Appellants, Mr. Mitchel became the regional manager for Maytag West Coast in 1959 (Op. Br. 64). Thus, cross-examination as to the time the report was made bears on the credence of witnesses.

It is significant that Mr. Alpine consulted said reports while giving his testimony [Dep. 237].

The circumstances under which the reports were made, the time they were made, under whose direction they were made, and who collaborated in the preparation of them, are subjects of legitimate inquiry which Maytag was foreclosed from pursuing.

Furthermore, the two asserted conversations took place while Maytag was still selling Manfree [Dep. 235, 236].[13] As pointed out herein pages 49-51, these conversations have no probative value because of Appellants' position that Maytag did not become a member of the alleged conspiracy until April 30, 1959. The Maytag franchise to Manfree expired on March 31, 1959 [Tr. 3375], consequently, the purported conversations between Mr. Alpine and Mr. Mitchel took place before plaintiffs claim that Maytag joined the asserted conspiracy.

III.

ACTS OF MAYTAG OCCURRING BEFORE APRIL 30, 1959 CAN NOT BE OVERT ACTS IN FURTHERANCE OF A CONSPIRACY AND HAVE NO PROBATIVE VALUE AS A BASIS FOR AWARDING DAMAGES.

As set forth, *supra,* pages 38-39, Appellants have stated that Maytag became a member of the alleged conspiracy on April 30, 1959.

The conduct which Appellants sometimes characterize in their Brief as anti-competitive occurring before April 30, 1959 consist of the following:

(a) The testimony of Mr. Sanford of Hale that Mr. Mitchel of Maytag West Coast told

[13]Appellants do not assign error as to the exclusion of Mr. Alpine's testimony as to a third conversation between him and Mr. Mitchel, which Mr. Alpine testified took place after Manfree ceased to buy from Maytag West Coast.

him in January or February of 1959 [Tr. 1111, 1112], that he was working on a new distribution pattern and that he was also working on a completely new dealer structure (Op. Br. 113).

(b) Hale would not buy or advertise the Maytag line in 1958 (Op. Br. 46, 47, 190). It should be noted that Appellants' assertion is a misstatement of the record, *supra,* page 28.

(c) Hale gave Maytag West Coast a purchase order for $10,848.00 in February of 1959 [Pl. Ex. 639], and was invoiced by Maytag West Coast for this amount on March 11, 1959 [Pl. Ex. 640-Op. Br. 46, 47, 90]. The undisputed testimony is that this purchase was for seven stores operated by Hale [Tr. 3382].

(d) Maytag West Coast advanced an advertising allowance of $3,000.00 to Hale in February or March of 1959 [Tr. 1117; Pl. Ex. 4153; Op. Br. 46, 47, 90].

The items above referred to could not be in furtherance of the asserted conspiracy inasmuch as they occurred before April 30, 1959 the date, according to plaintiffs, when Maytag became a member of the alleged conspiracy. (*Marshall v. United States, supra; Dahly v. United States, supra;* and *Steiner v. 20th Century-Fox Film Corporation, supra.*)

Also, it is hornbook law that in a civil treble damage antitrust action, an overt act or acts are necessary to establish damage, and that damage cannot be predicated upon the existence of a conspiracy alone.

Timberlake, Federal Treble Damage Antitrust Actions, sections 3.04 and 3.06, pages 15, 16 (1965).

Overt acts antedating participation in the alleged conspiracy cannot prove the alleged conspiracy, nor can they be the basis for an award of damages. As to such acts being without effect with respect to proving damages, it was said in the *Independent Iron Works, Inc.* case, *supra,* pages 670-671:

> "These actions had culminated in a settlement by the terms of which plaintiff released the defendants from all claims up to January 1, 1955; while the release would not render the facts constituting such claims inadmissible, *it did nullify them as the basis for an award of damages.* But how far a jury in a case of this magnitude could keep that fact in mind, although carefully admonished to do so, is at least problematical." (Emphasis added).

Counsel for plaintiffs acknowledged correctness of the rule above referred to in *Independent Iron Works, Inc., supra,* stating [Tr. 6062]:

> "Now, all I know is this: We are being honest, we say the date that you refused to sell us is the date where we say you hurt us."

Assuming the items referred to under this subheading are meaningful in any sense they are without probative force, in that they cannot prove Maytag's claimed entry into the alleged conspiracy, nor can they demonstrate that plaintiff was damaged by Maytag.

IV.
THE COURT DID NOT COMMIT ERROR IN ITS RULINGS ON DISCOVERY.

The discovery matters, of which Appellants complain pertaining to Maytag, are so insubstantial as not to merit extended discussion. The somewhat vague complaints of Appellants are found at pages 20-21 and 172-177 of their Opening Brief, and pages xlii-xliii of their Specification of Errors.

The rulings as to Maytag involve three situations.

(a) Those in which the items called for did not exist;

(b) Those involving demands which were granted, and

(c) Those requests of plaintiffs, at most two in number, which were denied.

In category (a) are the following:

Item 15 of plaintiffs' June 5, 1964 Motion for Production of Documents [R. 422, 425]. The response of The Maytag Company filed August 6, 1964 averred there were no documents in this category [R. 559, 561]. The Court's Order filed November 27, 1964 therefore properly denied production of the documents called for [R. 784, 786]. There was a similar Motion addressed to the distributor defendants, including Maytag West Coast Company, filed June 5, 1964 [R. 434, 437]. The response of Maytag West Coast Company filed August 6, 1964 [R. 554, 557], and the Court's Order filed November 27, 1964 [R. 787, 789], were the same as those pertaining to The Maytag Company.

Interrogatories 2, 3, 4, 5 and 6 of the group propounded by plaintiffs in September of 1964. As to these, the answers of The Maytag Company filed October 14, 1964 were as follows [R. 656, 657]:

> "No such statement or statements or reports exist with respect to the operation of the retail defendants in the City and County of San Francisco." [R. 656].

The Maytag West Coast answers filed October 14, 1964 were the same as those of The Maytag Company [R. 652, 653-654].

Items 22(c), (d) and (e) of Appellants' Motion to Produce filed November 20, 1964 [R. 745, 750]. As to these items, in each instance the response of The Maytag Company was as follows [R. 851, 859]:

> "No such documents exist."

The Order of the Court denying the production of said documents filed February 9, 1965 was obviously proper [R. 1006, 1008].

Documents which do not exist cannot be in the possession, custody or control of a party, hence such party cannot be compelled to produce them.

> *Fed R. Civ. P. 34;*
>
> *Moore, Federal Practice,* Section 34.17. (2nd Ed., 1964).

Item 20 of plaintiffs' Motion to Produce filed November 20, 1964 directed to the factory defendants,

falls into categories (a) and (c). Item 20 is here set forth [R. 745, 749]:

> "20. All letters received by you or any department engaged in the distribution or manufacture of household appliances or television sets from the plaintiffs in the above action, and all notes, memoranda or intra office communications concerning such requests."

The response of The Maytag Company filed December 28, 1964 at page 8, is as follows [R. 851, 858]:

> "There are no 'notes, memoranda or intra-office communications concerning such request' in the Maytag files."

The Court's Order filed February 9, 1965 at page 3 was [R. 1006, 1008]:

> "17. Paragraph 20 is denied, except that The Maytag Company shall produce any letters from plaintiffs to The Maytag Company which contain notes or memoranda by employees of The Maytag Company, and any notes, memoranda or inter-office communications relating thereto."

There was patently no error in limiting the letters to be produced to those containing notes placed thereon by employees of The Maytag Company as plaintiffs, in the ordinary course of business, would have copies of its correspondence with The Maytag Company. There is no complaint by Appellants that such letters were not produced.

In category (b) are the following:

We are uncertain whether Appellants are asserting error with respect to the ruling made on their Motion

for Production of Documents filed November 17, 1964 addressed to the distributor defendants, including Maytag West Coast [R. 687]. At pages 20-21 of Appellants' Opening Brief reference is perhaps made indirectly to the rulings of the Court with respect to items 20 and 22(c), (d) and (e) of said last mentioned Motion. In any event, items 20 and 22 were granted by the Court in its Order filed February 9, 1965 [R. 1010, 1012]. There is no item 27 in said Motion directed to the distributor defendants [R. 687-693].

In category (c) is the following item:

The second item which may be classifed as falling in category (c) is paragraph 27(f) of the Motion to Produce directed to the factory defendants, including The Maytag Company. The items requested were [R. 751-752, 745]:

> "27. All letters or notes of minutes found in the files of any of your officers, agents or representatives who attended associations composed of two or more manufacturers of household appliances or television sets during the period 1957 or 1964 pertaining to the following, NEMA, EIA, GAMA and AHLMA."
>
> * * * *
>
> "(f) Discount Department Stores or Mass Merchandising Stores."

The response of The Maytag Company to this portion of said Motion was [R. 851, 862]:

> "On the occasion of the hearing upon plaintiffs' first motion for production of the documents on August 7, 1964, the Court refused to require the production of minutes. The data called for by this

item and its subdivisions has no relevance to the actions, and no good cause is shown for the production thereof."

The Court's Order with respect to paragraph 27 was [R. 1006, 1008]:

"25. Paragraph 27 is denied, except that the Code of Ethics referred to in Subsection (e) of said Paragraph shall be produced."

Apart from other considerations there is no averment in the Affidavit in support of the Motion as to the existence of the documents called for [R. 753, 772]. This is sufficient to deny their production.

Wharton & Lybrand v. Loss Bros. & Montgomery, 41 F.R.D. 177, 180 (E.D. N.Y. 1966);

Chapman v. Brown, 198 F. Supp. 78, 92 (D. Hawaii 1961).

V.

NO ERROR WAS COMMITTED AS TO SCOPE OF CROSS-EXAMINATION OR REHABILITATION ON REBUTTAL IN THE EXAMINATION OF WITNESSES.

With respect to Maytag, Appellants do not, in their Brief, discuss any claimed error in the examination of Maytag witnesses. In their Specification of Errors, pages xli-xlii, Appellants assign as error an asserted limitation in the examination of Mr. Mitchel for the purpose of impeaching him through his deposition. This Specification of Error is completely without foundation. Counsel for plaintiffs stated that he wished to read pages 47 to 51 of the Mitchel depostion [Tr. 3415]. After some colloquy the Court permitted plaintiffs'

counsel to read the portion of the deposition as requested and other portions [Tr. 3420]. Counsel then read the portions indicated [Tr. 3421-3427]. Parenthetically, it should be noted that Mr. Mitchel was not impeached.

Conclusion.

For the foregoing reasons we respectfully submit that the Judgment for Appellees, The Maytag Company and Maytag West Coast Company, should be affirmed.

Respectfully submitted,

HORACE L. HAHN,
FRANK R. JOHNSTON,
NEWLIN, TACKABURY &
JOHNSTON,
Attorneys for Appellees, The Maytag Company and Maytag West Coast Company.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK R. JOHNSTON